

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 71967-41B BY MARVIN L. AND)	
BEATRICE STEWART)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 9, 1990 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 71967-g41B is hereby granted to Marvin L. Stewart and Beatrice Stewart to appropriate 350 gallons per minute up to 50.00 acre-feet per year of groundwater to be used for new sprinkler irrigation purposes by means of an existing well. The well is located at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, Township 7 South, Range 9 West, in Beaverhead County and the place of use shall be 23.00 acres located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, Township 7 South, Range 9 West, in Beaverhead County.

CASE # 71967

The period of appropriation and use shall be from April 1 through October 1, inclusive of each year. The priority date shall be June 27, 1989 at 1:54 p.m.

This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

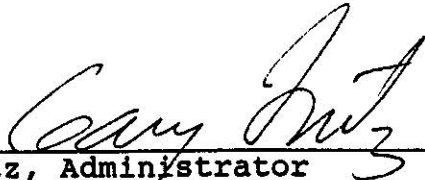
This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured.

Issuance of this permit shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 25 day of July, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resource Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, at their address or addresses this 26th day of July, 1990, as follows:

Marvin L. and Beatrice Stewart
P.O. Box 1320
Dillon, MT 59725


Richard H. Kennedy, Manager
East Bench Irrigation District
Clark Canyon Water Supply Co.
1100 Highway 41
Dillon, MT 59725

Tash T-Diamond Livestock, Inc.
1200 Highway 278
Dillon, MT 59725

T.J. Reynolds
Field Manager
1520 East 6th Avenue
Helena, MT 59620

Bill Uthman
Hydrogeologist
Department of Natural
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P.O. Box 166
Dillon, MT 59725



Cindy G. Campbell
Hearings Unit Secretary

BB *here*

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 71967-41B BY MARVIN L. AND)
BEATRICE STEWART)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on March 15, 1990 in Dillon, MT.

Applicant Marvin L. Stewart appeared pro se and by and through Counsel Cecil Jones.

Applicant Beatrice Stewart appeared pro se and by and through Counsel Cecil Jones.

Ronald W. Johnson appeared as a witness for the Applicants.

Objector Tash T-Diamond Livestock, Inc. (hereafter Tash) appeared by and through William Tash.

Objector East Bench Irrigation District appeared by and through Manager Richard H. Kennedy.

Objector Clark Canyon Water Supply Company appeared by and through Manager Richard H. Kennedy.

Bill Uthman, Hydrogeologist with the Department of Natural Resources and Conservation, appeared at the hearing.

Jim Beck, Agricultural Engineer with the Department of Natural Resources and Conservation (hereafter, Department), appeared at the hearing.

CASE # 71967

EXHIBITS

The Applicant offered two exhibits for inclusion in the record in this matter.

Applicants' Exhibit 1 is a USGS Quadrangle, Dillon West, Montana, photorevised in 1979, which has been enhanced to show the location of Applicants' well, the location of the Johnson test well, and general location of the Tash property.

Applicants' Exhibit 2 is a single sheet of paper entitled "Johnson Test Well Data". Below the title are two columns identified as "Date" and "Well Depth". "Well Depth" should actually be "Static Water Level" as discussed during the offering of this exhibit. This exhibit has static water measurements from 1978 through 1985, then the years 1989 and 1990.

Applicants' Exhibits 1 and 2 were received into the record without objection.

Objector Tash attempted to enter copies of his claims. The Applicants objected to the entry of those particular documents into the record because they were unsigned documents which were not notarized. Since the documents were copies of the original Water Right Claims filed with the Water Court that are part of the Department's record, the Hearing Examiner will take official notice of the Water Right Claims filed by Tash as they appear in the Department's files.

All parties to the hearing reviewed the Department's file and it was accepted into the record without objection.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in § 85-2-306, MCA, do not apply in the present matter.

2. Marvin L. and Beatrice Stewart filed the above-entitled Application with the Department on June 27, 1989 at 1:54 p.m.

3. Pertinent portions of the Application were published in the Dillon Tribune, a newspaper of general circulation in the area of the source, on August 8, 1989.

4. The Applicants propose to appropriate 350 gallons per minute (gpm) up to 50 acre-feet per year of groundwater at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, Township 7 South, Range 9 West in Beaverhead County, to be used for new sprinkler irrigation on 23.00 acres located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, Township 7 South, Range 9 West, in Beaverhead County. The proposed period of appropriation and use is from April 1 through October 1, inclusive of each year. (Department file)

5. The source of water is groundwater, to be diverted by means of a well and pump. The well was developed in 1985 and is used for irrigation on other acreage adjacent to the proposed place of use. The well was developed by a licensed water well driller to a depth of 140 feet and cased to a depth of 112 feet.

When the driller tested the Applicants' well, after a 24 hour pumping period, the drawdown was six inches. The well is by no means the most efficient well but is adequate for the proposed use. (Department file and testimony of Bill Uthman.)

6. Applicants owned and irrigated the east side of a field in the S½ of the SW¼ of Section 28, Township 7 South, Range 9 West. When the west side of that field was offered for sale, Applicants purchased that property and made the instant Application for a Beneficial Water Use Permit to irrigate those 23 acres. This will be accomplished by extending the pipe used on the east side of the field to the west side of the field, and using the existing well.

7. There is a test well, referred to as the Johnson well, located approximately three quarters of a mile from the Applicants' well. The static water level in the Johnson well indicates that from October 6, 1978, to April 8, 1982, the greatest fluctuation was six inches, with a low measurement of eight feet, six inches on November 24, 1979, and a high measurement of eight feet on October 6, 1978. During the period of September 4, 1982, to October 13, 1985, the low measurement was eight feet, three inches on November 12, 1983. The high measurement was six feet, two inches, on July 28, 1984, a fluctuation of two feet, one inch. This small amount of fluctuation is what may be expected from annual variations of precipitation. It indicates a fairly stable water level.

(Applicants' Exhibit No. 2 and testimony of Bill Uthman, Beatrice

Stewart, and Ron Johnson.)

8. The water level in the Johnson well is indicative of the level in the Applicants' well. The two wells are interconnected and are finished in a common aquifer. Absent other information, the static water levels may be used as an indication of the stability of the water table and availability of groundwater for additional appropriations. (Testimony of Bill Uthman.)

9. Mr. Uthman testified that although he had not visited the Applicant's well site, he had previously investigated another well site in the same area. The information gained from that investigation and various other references available to him as a hydrogeologist, indicate there is a hydrological connection between the groundwater and the surface water. Rattlesnake Creek is a gaining and losing stream, i.e., there are sections of Rattlesnake Creek that lose water to the aquifer and there are sections of the creek that gain water from the aquifer. However, the water entering the Applicants' well is groundwater because the well is completed with an open-end casing at the bottom of the aquifer at a considerable distance from that stream. The locations of the losing and gaining sections of Rattlesnake Creek are unknown and would have to be determined by field work. (Testimony of Bill Uthman.)

10. Applicants' proposed appropriation are not expected to create any major additional demands or damage to the aquifer. There is groundwater available for appropriation in an amount sustainable for the use at the proposed point of diversion when

the water can be put to the proposed use during the period in which the applicants seek to appropriate. (Testimony of Bill Uthman.)

11. Objectors East Bench Irrigation District and Clark Canyon Water Supply Company believe the appropriation of groundwater is reducing the amount of water available for their prior surface water right.

A search of the Department's records revealed no water rights listed for East Bench Irrigation District or for Clark Canyon Water Supply Company. There are ten water rights, all surface water, listed for Canyon Irrigation Co.

12. Richard Kennedy testified that since the drought, there has not been enough water for all the irrigators. He stated that everytime a new well is developed in the area it takes a small amount of water away from the basin. When that water is used, it depletes the return flows and the accretions that were available to the water users of the East Bench Irrigation District and the Clark Canyon Water Supply Company. This, in turn, places an additional burden on the storage facility. He stated that drop by drop, the new wells are depleting the available water in the basin, that it was not one specific well, but the cumulative effect of all the new wells.

13. Tash has nine Water Right Claims before the Water Court. Three of the Claims are for water use from Van Camp Springs, one Claim is for water use from a waste water slough which captures waste water from the springs. The remaining Water

Right Claims are for surface water. Three claim water from the Beaverhead River; one claims water from Van Camp Slough; and one claims water from Dory Creek. Objector Tash believes his prior rights will be affected by the proposed water use because there is no water, groundwater or surface water, available for appropriation. He stated that these drought years have proved there is no new water available for irrigation, whether it be surface water or groundwater.

14. Department records revealed no planned uses or developments for which a permit has been issued, nor any planned uses or developments for which water has been reserved, that may be adversely affected by the proposed project.

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein and the parties hereto.

3. The Department must issue a Beneficial Water use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the

applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2)(a), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 5.

6. The Applicants have possessory interest in the proposed place of use. See Finding of Fact 6.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 12.

8. There are unappropriated waters in the source of supply, at the point of diversion, at the times when the Applicants can use it, in the amount requested throughout the proposed period of appropriation. See Findings of Fact 7, 8, and 10.

9. Objectors allege that Applicants proposed project will adversely affect their surface water rights and, in Tash's case, the water rights from its springs and sloughs. See Finding of Facts 12 and 13. It is true that the groundwater and surface water are hydrologically connected. However, the extent of this connection is unknown. See Finding of Fact 9. Groundwater over-appropriation, in the absence of long-term records, cannot be interpreted from low stream flows and declines in the water table when those observations were taken during a drought period. There are no indications that the groundwater table has lowered; in fact, groundwater levels appear to have remained constant. Records kept on the Johnson well indicate stable static water levels relative to seasonal fluctuations. See Finding of Fact 7.

A permit cannot be granted unless the applicant proves that water rights of prior appropriators will not be adversely affected. The burden of persuasion always remains with the applicant, but that does not mean the objector has no obligation to come forward with evidence. Once the applicant has gone forward and presented evidence making a prima facie case that the statutory criteria are met, the objector risks a ruling against him if he does not go forward with rebutting evidence.

There was no evidence presented that the Applicant's proposed additional use from the existing irrigation well would cause an adverse effect. Mr. Kennedy stated that since the drought began there had not been enough water for all the irrigators. Tash stated there is no water available for new

irrigation and that these drought years have proved the fact that there is no new water available for irrigation whether it be surface water or groundwater. See Finding of Fact 12. However, there is no specific evidence of adverse effect presented by those Objectors. Mere diminution is not an adverse effect. See Hunt, Permit No. 33484-g40A, Final Order issued May 3, 1984, § 85-2-401, MCA, 1989. Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 71967-g41B is hereby granted to Marvin L. Stewart and Beatrice Stewart to appropriate 350 gallons per minute up to 50.00 acre-feet per year of groundwater to be used for new sprinkler irrigation purposes by means of an existing well. The well is located at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, Township 7 South, Range 9 West, in Beaverhead County and the place of use shall be 23.00 acres located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, Township 7 South, Range 9 West, in Beaverhead County. The period of appropriation and use shall be from April 1 through October 1, inclusive of each year. The priority date shall be June 27, 1989 at 1:54 p.m.

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appropriator.

This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured.

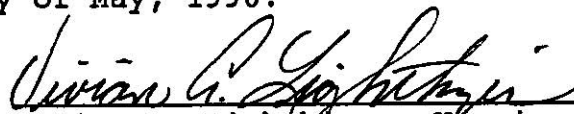
Issuance of this permit shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit; acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served on all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 9th day of May, 1990.


Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, MT 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, at their address or addresses this 10th day of May, 1990, as follows:

Marvin L. and Beatrice Stewart
P.O. Box 1320
Dillon, MT 59725


T.J. Reynolds
Field Manager
1520 East 6th Avenue
Helena, MT 59620

Richard H. Kennedy, Manager
East Bench Irrigation District
Clark Canyon Water Supply Co.
1100 Highway 41
Dillon, MT 59725

Bill Uthman
Hydrogeologist
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1520 East 6th Avenue
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Irene V. LaBare
Legal Secretary